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December 23, 2004

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED

DEC 27 2004

Federal Communications Commission
Office of Secretary

Re: Sandwich Isles Communications, Inc., Petition for Waiver of the
Definition of "Study Area" Contained in Part 36, Appendix-
Glossary and Sections 36.611, and 69.2(hh) of the Commission's
Rules.
CC Doc. No. 96-45

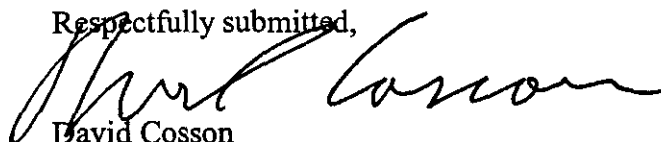
Dear Ms. Dortch:

Attached please find an original and four copies of the Petition for Waiver, *nunc pro tunc*, of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules and of Sections 36.611 and 69.2(hh) of the Commission's Rules being filed by Sandwich Isles Communications, Inc.

The requisite filing fee and FCC Form 159 Remittance Advice is being submitted by courier to Mellon Bank, Pittsburgh, Pennsylvania on this date.

Please acknowledge receipt on the "stamp and return" duplicate document attached for this purpose. All correspondence and inquiries concerning this filing should be addressed to the undersigned.

Respectfully submitted,



David Cosson
Counsel for Sandwich Isles Communications, Inc.

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
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"Study Area" Contained in Part 36,)
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PETITION FOR WAIVER

Sandwich Isles Communications Inc.

David Cosson
Kraskin, Moorman & Cosson, LLC
2120 L St., N.W., Suite 520
Washington, D.C. 20037

Its Attorney

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SUMMARY

In accordance with the Commission's October 2004 Order reversing the 1998 decision of the Common Carrier Bureau, Sandwich Isles petitions the Commission to reestablish its study area as the Hawaiian Home Lands and grant related rule waivers necessary to allow it to receive interstate access and universal service support based on its own cost. Sandwich Isles' petition is without prejudice to its position that the Hawaiian Home Lands were not included in the study area of GTE Hawaiian Telephone Company in 1998, nor are they included in Verizon's study area today. Sandwich Isles also shows that it meets the standard conditions for waiver of the freeze of study area boundaries, and that grant of its Petition is supported by principles of equity, avoidance of undue hardship, and consistency with the policy goals of the Communications Act.

Designation of the Hawaiian Home Lands as Sandwich Isles' study area is especially warranted given the lack of support for the claim that GTE's study area ever encompassed the entire state. The current FCC rules contain no meaningful definition of the term study area. Referring to the previous rule's definition as a company's area of operations within a state, it is evident that GTE did not operate statewide. Because the Department of Hawaiian Home Lands has not licensed GTE or Verizon to operate on the Hawaiian Home Lands, and the carriers have no power of eminent domain on the Hawaiian Home Lands, an unlicensed carrier, such as GTE or Verizon cannot legally construct facilities to provide communications service. Sandwich Isles, however, is so licensed and has constructed extensive facilities.

Although the Hawaii Public Utilities Commission designated GTE as an ETC “statewide,” it also so designated Sandwich Isles for the Hawaiian Home Lands, and has annually certified Sandwich Isles for USF support as an incumbent carrier. Further, this Commission had previously removed a portion of the state from GTE’s study area and established a new study area for a new carrier, TelHawaii. Although that carrier subsequently abandoned its efforts, its existence at the time demonstrates the principle that ETC designation does not expand an incumbent’s study area. Finally, GTE voluntarily restricted its area of operations by constructive refusal to deploy facilities in rural areas in general and on the Hawaiian Home Lands in particular by demanding contributions in aid of construction which could not be met by either residents or the Department of Hawaiian Home Lands. It was, in fact, this constructive refusal to provide service that gave rise to the creation of Sandwich Isles and its status as the carrier authorized by the Department of Hawaiian Home Lands, to provide service to the essentially unserved Hawaiian Home Lands.

The Hawaiian Home Lands were established as a trust by Congress in 1921, but struggled for many years to find the financial resources to develop the lands for the trust beneficiaries. Through the 1990s, the Hawaiian Home Lands, like much of rural Hawaii, also suffered from the unavailability of affordable telecommunications services, as the incumbent telephone company required large capital contribution to extend service, and even where it had service, demanded more contribution to upgrade to single party service.

Sandwich Isles was established in 1995 to rectify this problem by establishing a new carrier that would construct facilities throughout the Hawaiian Home Lands with the aid of capital funding from the Rural Utilities Service. Sandwich Isles' parent received a license to serve the entire Hawaiian Home Lands, with strict performance requirements from the Department of Hawaiian Home Lands, the state agency administering the trust lands. Sandwich Isles subsequently was designated as an Eligible Telecommunications Carrier by that agency, and also by the Hawaii Public Utilities Commission which also issued a Certificate of Authority to provide intrastate and intraLATA communications services throughout the Hawaiian Home Lands.

In 1998, over the objections of GTE, the Common Carrier Bureau granted Sandwich Isles various rule waivers permitting it to be treated as an incumbent local exchange carrier and designated its service area as its study area. In reliance on this waiver, Sandwich Isles has invested \$166 Million in telecommunications facilities, and has grown from one exchange on Oahu at the time of its waiver petition to providing service on Hawaiian Home Lands developments on five islands and expects to begin service on the sixth in the first quarter of 2005.

Now, six and a half years later, the Commission has reversed the Common Carrier Bureau waiver and determined that Sandwich Isles is operating in the study area of GTE's successor, Verizon. While reversing the prior waiver, the Commission has allowed Sandwich Isles to continue functioning as an incumbent until the Commission

acts on a new petition for waiver of the 1984 study area freeze. Sandwich Isles respectfully herein complies with the requirement to file a new waiver request in accordance with the Commission's October 29, 2004 decision. By so doing, Sandwich Isles seeks to fulfill the administrative process now established by the Commission almost seven years after the Bureau decision. In 1997 Sandwich Isles came to the Commission to fulfill the administrative and regulatory processes necessary to establish its provision of service to the Hawaiian Home Lands. It was an incumbent service provider operating within a defined study area in accordance with the license issued by the appropriate authorized state agency.

Subsequent to the issuance of the Common Carrier Bureau Waiver, the facts demonstrate that Sandwich Isles has acted in the public interest and in accordance with both the operating authority it holds and the designation as an Eligible Telecommunications Carrier by both the Department of Hawaiian Home Lands and the Hawaii Public Utilities Commission. No other facts have changed subsequent to the initial waiver issued by the Common Carrier Bureau. Neither GTE nor its successor, Verizon, is properly authorized to provide service to the Hawaiian Home Lands. But for the provision of service by Sandwich Isles during the past seven years in reliance on the waiver issued by the Bureau, the Hawaiian Home Lands would remain essentially unserved. In order to achieve the most expedient administrative resolution to this matter, Sandwich Isles, both in reliance on and in accordance with the Commission's October 29 decision, shows that it meets the three specific criteria for waiver of the study area freeze: (1) Grant of the waiver will not have an adverse effect on the Universal Service Fund as

the support received will be less than one percent of the total high cost fund during fund year 2005; (2) the two state agencies with regulatory jurisdiction over Sandwich Isles both state that they do not object to grant of the waiver; and (3) the public interest will be served by making possible the critical communications infrastructure necessary to fulfillment of the commitment to the people of Hawaii made by Congress over 70 years ago.

Without the requested waivers, Sandwich Isles revenues will decline so severely that it will be unable to continue operations, much less complete its expansion to serve all of the Hawaiian Home Lands. These revenues cannot be made up from the residents of the Hawaiian Home Lands in the form of drastically increased local service charges, or from the Department of Hawaiian Home Lands. The severe hardship would then fall on the backs of the residents of the Hawaiian Home Lands who would be without telecommunications service, and on the U.S. Government, as lien holder. Grant of the waivers will serve the public interest and be consistent with the Communications Act, the Hawaiian Homes Commission Act, and the Commission's precedents.

In the absence of grant of this waiver request, Sandwich Isles would have no choice but to discontinue the mission it undertook over the past seven years to expand service to the Hawaiian Home Lands in reliance on the regulatory framework established by the grant of the Bureau's waiver which has now been reversed. The Commission's October 29, 2004 Order has resulted in uncertainty and instability with regard to the future viability of the operations of Sandwich Isles. Infrastructure deployment and

planning has been disrupted. The expedient grant of this waiver request will properly end this otherwise unnecessary disruption in a manner consistent with principles of equity, prevention of severe hardship and the universal service goals of the Communications Act.

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Appendix-Glossary and Sections 36.611,)	
and 69.2(hh) of the Commission's)	
Rules)	

PETITION FOR WAIVER

Sandwich Isles Communications, Inc. ("Sandwich Isles"), by its attorney, pursuant to Section 1.3 of the Commission's Rules and the Commission's Memorandum Opinion and Order released October 29, 2004¹ respectfully requests a waiver, *nunc pro tunc*, of the definition of "Study Area" contained in Part 36, Appendix-Glossary and waiver of Sections 36.611, and 69.2(hh) of the Commission's Rules. Sandwich Isles files this petition without prejudice to its position that GTE Hawaiian Telephone Company's ("GTE") study area never included the Hawaiian Home Lands ("HHL") or that Verizon's study area does not include the HHL today, and that, therefore, no waiver is necessary with respect to Sandwich Isles operations on the HHL. As explained more fully in Section I, below, Sandwich Isles conclusion that the HHL were not included in

¹ *GTE Hawaiian Telephone Company, Inc., Application for Review of a Decision by the Common Carrier Bureau; Sandwich Isles Communications, Inc., Petition for Waiver of section 36.611 and Request for Clarification, AAD97-82, Memorandum Opinion and Order, FCC 04-256, released Oct. 29, 2004. ("GTE Hawaiian Tel").*

GTE's study area, or now in Verizon's is based, *inter alia* on the unique characteristics of HHL, and GTE's constructive refusal to provide service on HHL by establishing aid to construction requirements which could not be met. Nevertheless, because expeditious action is imperative, and in reliance on and in accordance with the Commission's Order, Sandwich Isles requests that the Commission establish its study area as the HHL and adjust the study area of Verizon Hawaii, Inc. to the extent necessary.

I INTRODUCTION AND BACKGROUND

A. Sandwich Isles Communications Inc.

Sandwich Isles is a native Hawaiian owned rural Local Exchange Carrier ("RLEC") providing telecommunications services to the HHL. The HHL consist of approximately 70 non-contiguous parcels, which total 203,500 acres on the 6 major Hawaiian Islands and are administered by the State of Hawaii, Department of Hawaiian Homelands ("DHHL").² The establishment of Sandwich Isles in 1995 was in conjunction with the State's efforts during the 1990s to improve telephone service in rural areas. Sandwich Isles is the only RLEC operating in Hawaii that the Commission has authorized to participate in NECA and receive High Cost Support based on its own costs.

In 1992, the Hawaii Public Utilities Commission ("HPUC") initiated a proceeding to investigate "...the telephone service provided by GTE Hawaiian Telephone ("GTE") in

² The history and legal status of the HHL are described further below. Maps showing the general location of the HHL on each Island are attached as Appendix A.

the rural areas of the State of Hawaii.”³ At that time GTE was offering only multi-party service in some areas. In 1994, the Hawaii Legislature enacted Act 80, which directed the HPUC to improve the telecommunications service in the rural areas by authorizing another telephone company to provide service if necessary.⁴ In November 1994, the HPUC found telecommunications service in the rural areas of the state “less than adequate.”⁵ In December 1994, the HPUC ordered GTE to show cause why the HPUC should not authorize an alternative telecommunications provider for the rural areas.⁶ In December 1995, the HPUC allowed telecommunications carriers other than GTE to seek authorization to provide telecommunications service in the rural areas.⁷ In July 1996, the HPUC selected TelHawaii, Inc. to provide telecommunications service in the Ka’u area of the island of Hawaii.⁸ This Commission granted TelAlaska a study area waiver in August 1996.⁹

During this same period, the DHHL was planning to significantly accelerate the development of the HHL. This required a solution to the high cost and limited availability of an acceptable level of telephone service on those HHL parcels being developed. Over 98% of HHL are located in rural areas, the vast majority of which were still

³ HPUC Doc 7497; Order No 11886, September 29, 1992.

⁴ Hawaii Revised Statutes (“HRS”) Section 269-16.9 (h).

⁵ HPUC Doc 7497; Order No. 13626, November 2, 1994.

⁶ HPUC Doc 94-0346; Order No. 13679, December 12, 1994.

⁷ HPUC Doc 94-0346; Order No. 14415, December 13, 1995.

⁸ HPUC Doc 94-0346; Order No. 14789, July 15, 1996.

⁹ *TelAlaska, Inc. and TelHawaii, Inc., Petition for Waiver of Section 36.611, 36.612, 61.41(c)(2) and the Definition of “Study Area”*, Aug 16, 1996, AAD 96-93.

(“TelHawaii”) TelHawaii eventually abandoned its efforts to provide service after an adverse court decision in litigation with GTE.

undeveloped.¹⁰ Historically, GTE required DHHL to pay the total cost of the local loop infrastructure to obtain telephone service. This resulted in some populated areas of HHL not having any type of phone service. In 1993, after the HPUC initiated the proceeding focusing on the poor quality of rural phone service, GTE told DHHL that it would only provide party line service unless DHHL paid the costs of upgrading GTE's switching facilities as well as the local loop.¹¹

In May 1995, DHHL issued the first and only telecommunications license ("License") to Waimana Enterprises, Inc. ("Waimana") to finance, construct and operate a modern telecommunications network serving all of the HHL parcels. Waimana formed a wholly owned subsidiary, Sandwich Isles to meet the requirements of the License.¹² In November 1997, recognizing that DHHL had authorized Sandwich Isles to serve HHL, the HPUC issued Sandwich Isles a Certificate of Authority ("COA") to provide IntraLATA and Intrastate telecommunications service to "lands administered by DHHL."¹³ On December 17, 1997, Sandwich Isles' tariff for local and intrastate service became effective.

¹⁰ In part because of Sandwich Isles efforts to make modern and affordable telecommunications services available, DHHL expects to increase the number of residents on the HHL to approximately 20,000.

¹¹ Sandwich Isles Communications, Inc., Petition for Waiver, AAD 97-82, July 7, 1997, see Opposition to Application for Review at 10, and Michael Crozier affidavit (March 27, 1998).

¹² Partial assignment of the License was made to Sandwich Isles Communications, Inc. to provide IntraLata and Intrastate telecommunication services on January 15, 1996.

¹³ *Application of Sandwich Isles Communications, Inc. for Authorization to Provide IntraLata and Intrastate Telecommunications Services Within and Between Hawaiian Home Lands Throughout the State of Hawaii Pursuant to HRS Section 269-16.9*, Doc. No. 96-0026, Order No. 16078, Nov. 14, 1997. ("HPUC COA Order") A copy of this order was filed in AAD 97-82, Letter from Sylvia Lesse and Margaret Nyland to Magalie Roman Salas, Secretary, Nov. 19, 1997.

On May 14, 1997 the DHHL designated Sandwich Isles as an Eligible Telecommunications Carrier (“ETC”).¹⁴ DHHL reaffirmed the ETC designation on June 2, 1998.¹⁵ On December 9, 1998, the HPUC also designated Sandwich Isles an ETC “...for the service area consisting of lands administered by the DHHL...”¹⁶ In addition, the HPUC has annually certified to the FCC and USAC that Sandwich Isles is a “rural incumbent local exchange carrier, also classified as an eligible telecommunications carrier,” that should continue to receive federal high-cost support funds for the provision, maintenance, and upgrading of facilities and services for which the support is intended.¹⁷ GTE did not challenge or object to the issuance of Sandwich Isles License, COA or ETC. This is in direct contrast with GTE’s timely actions during the same period to challenge the HPUC decision granting TelHawaii the right to serve Ka’u¹⁸ and the TelHawaii petition at this Commission.¹⁹

B. Hawaiian Home Lands.

In 1921, while Hawaii was a United States Territory, Congress enacted the Hawaiian Homes Commission Act (“HHCA”)²⁰ to rehabilitate native Hawaiian people. The HHCA set aside approximately 203,500 acres of undeveloped rural lands for native

¹⁴ Ltr from Kali Watson, Chairman, HHC to Common Carrier Bureau, FCC, May 14, 1997.

¹⁵ Ltr from Kali Watson, Chairman, Hawaiian Homes Commission to Universal Service Administrative Company, June 2, 1998. (“Watson 1998 letter”).

¹⁶ *Application of Sandwich Isles Communications, Inc. For Designation as an Eligible Telecommunications Carrier in the State of Hawaii pursuant to FCC Universal [sic] Report and Order No. 96-45*, Doc. No. 98-0317, D&O No. 16737, Dec. 9, 1998.

¹⁷ Copies of these certifications are attached as Appendix B.

¹⁸ *GTE vs HPUC et al.*, Hawaii ICC 97-0-004372, October 23, 1997.

¹⁹ *TelHawaii* at para. 10.

²⁰ Hawaiian Homes Commission Act 1920, 48 Stat. 108.

Hawaiian use. From 1921 until 1959 these trust lands were administered by the Hawaiian Homes Commission (“HHC”) with oversight by the United States Department of Interior. In 1959 when Hawaii became a state, the Hawaii Admission Act required the incorporation of the HHCA into the Hawaii State Constitution and transferred the trust lands to the state.²¹ Although state lands, the HHC, acting through the DHHL, retains exclusive management authority for HHL.²² The Congress of the United States continues to reserve the right to alter, amend or repeal the provisions of the HHCA.²³ Mandating the HHCA be included as part of the Hawaii State Constitution created a situation unique to Hawaii for the regulation of public utilities on HHL.

C. Hawaii Public Utilities Commission.

The HPUC is established and empowered by statute with the jurisdiction and powers common to other state public utilities commissions.²⁴ This jurisdiction and power to regulate is limited on HHL by the HHCA. The Hawaii Supreme Court has held that regulation by state agencies other than DHHL may be preempted where enforcement would significantly affect HHL, but not where the effects of regulation are incidental.²⁵ The DHHL derives its authority from the State Constitution and the HPUC derives its

²¹ Hawaii Statehood Act, 73 Stat. 4 This historical description is taken largely from S. Rep. 108-85, 108th Cong. 1st Sess. (2003) Note that this portion of the Hawaii Constitution may not be amended without consent of the United States, and the United States retains the right to bring suit for breach of the trust imposed. The HHCA is now considered Hawaiian Constitutional law, rather than federal law. As such, state statutes which conflict with the HHCA are preempted. *Kepo`o v. Watson*, 952 P.2d 379, 87 Hawaii 91 (1998). (“*Kepo`o*”) Preemption does not extend to ordinary police powers *State v. Jim*, 907 P.2d 754 (1995).

²² *Ahuna v. Department of Hawaiian Home Lands*, 640 P. 2d 1161, 1168 (1982).

²³ State of Hawaii Constitution, Art. XII, Sec.1; HHCA section 223.

²⁴ HRS Chapter 269.

²⁵ *Kepo`o* at 87 Hawaii101.

authority from State Statute.²⁶ The HPUC therefore may exercise its regulatory power over public utilities operating on HHL so long as it does not conflict with the constitutional responsibilities of DHHL.²⁷ A clear example of this limitation, and one recognized by the HPUC is that public utilities may not exercise the right of eminent domain on the HHL.²⁸ Despite the complexities of this unique multi-agency jurisdictional situation, and since DHHL and the HPUC are in agreement with the requested study area waiver, there is no need or cause for this Commission to delineate the respective scopes of authority of the two state agencies in order to grant Sandwich Isles' Petition.

D. Historical Authorization of Providers of Telephone Service in Hawaii.

GTE claimed its obligation to serve the entire archipelago derived from an 1883 "charter" from the Kingdom of Hawaii.²⁹ During the era when Hawaii was a Kingdom (pre-1900), several telephone companies were "chartered" to provide telephone service to various areas throughout Hawaii. The first, Hawaiian Bell Telephone Company was incorporated in 1880; Hilo and Hawaii Telephone and Telegraph Company in 1882; Mutual Telephone Company ("Mutual") in 1883; Maui Telephone Company in 1889; Hamakua and South Kohala Telephone and Telegraph Company in 1889 and, Kona-Ka'u

²⁶ The situation in Hawaii is significantly different from that of Indian Tribes in the other 49 states, where the federal government holds the land in trust, but at least some police powers are exercised by a sovereign government separate from the state in which the reservation is located.

²⁷ *Yuen v. Hawaiian Homes Commission*, 37 Haw. 8, 11 (1944).

²⁸ See Appendix C. Ltr from Yukio Naito, Chairman HPUC to Albert S.N. Hee, Sept. 20, 1995, including reference to State of Hawaii Attorney General Opinion No. 60-77 (1960).

²⁹ Opposition of GTE Hawaiian Telephone Company Incorporated to Sandwich Isles Communications, Inc.'s Petition for Waiver and Request for Clarification, AAD 97-82, Sep. 15, 1997, at 8-9, Affidavit of Susan Eichor at 1.

Telephone and Telegraph Company in 1895. Clearly the Monarchy did not grant a monopoly to any one company to serve the entire archipelago. The Monarchy allowed numerous telephone companies to serve the Kingdom.

During the era when Hawaii was a United States Territory (1900-1959), the Hawaiian Telegraph and Telephone Co incorporated in 1907. On March 28, 1916, the Territorial Legislature granted franchises to the gas, electric, and transportation public utilities. The Territorial Legislature did not grant any franchise to a telephone company. In 1961, the Hawaii State Legislature enacted Act 134. The Act continued the franchises that had been granted by the Territory of Hawaii and the Legislature retained for itself the authority to grant franchises. By this time the numerous companies had by attrition and/or mergers combined into Mutual, which became Hawaiian Telephone Company (“Hawaiian Tel”). The Legislature did not grant Hawaiian Tel the franchise to provide telephone service despite being the only telephone company operating at that time.

E. Sandwich Isles 1997 Petition

In 1997, Sandwich Isles, as a new RLEC, requested a waiver of Section 36.611 to permit it to receive high cost loop support on the basis of projected costs until historical costs became available.³⁰ Six weeks after the comment period had closed on the Petition, GTE filed an opposition.³¹ Sandwich Isles replied there was no overlap of service areas

³⁰ Sandwich Isles Communications, Inc., Petition for Waiver of section 36.611 of the Commission’s Rules and Request for Clarification, Jul. 8, 1997, AAD 97-82 (“Petition”).

³¹ Opposition of GTE Hawaiian Telephone Company Incorporated to Sandwich Isles Communications, Inc.’s Petition for Waiver and Request for Clarification, AAD 97-

and that in any event GTE had not shown good cause for its failure to timely file comments.³²

The then Common Carrier Bureau granted the Sandwich Isles Petition in February 1998 and also waived the provisions of Parts 36 and 69 that restrict high cost support based on a LEC's own cost and membership in the National Exchange Carrier Association ("NECA") to incumbent LECs.³³ The Bureau also stated that it would recognize Sandwich Isles' service territory as a study area.³⁴ In October 2004, six and one half years later, the Commission in *GTE Hawaiian Tel* reversed the Bureau's decision, but maintained the *status quo* until final action on a study area waiver petition, provided that Sandwich Isles filed such a petition within 60 days of the effective date of the order.³⁵

Sandwich Isles respectfully asserts, however, that the 1998 Bureau decision was correct and developments since that time are fully consistent with the conclusion that the GTE/Verizon study area did not and does not include the HHL. Sandwich Isles presents below the facts supporting its assertion that were not considered by this Commission. These facts alone justify an order reaffirming Sandwich Isles study area. In addition,

82, Sep. 15, 1997. GTE claimed it was unable to file timely comments because of internal staff changes and involvement in other proceedings.

³² Sandwich Isle waiver request did not include those few small portions of the HHL where GTE was then providing service to actual subscribers. Sandwich Isles. Communications Inc., Supplement, AAD 97-82, Jun. 1, 1998. (providing explicit maps and photographs of Sandwich Isles service area.).

³³ *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission's Rules and Request for Clarification*, Order, AAD 97-82, 13 FCC Rcd 2407 (Acct. Aud. Div. 1998) ("Bureau Order").

³⁴ *id.*

³⁵ *GTE Hawaiian Tel. at para. 10.*

Sandwich Isles presents in Part II, the standard information required in a more usual petition for study area waiver.

F. *GTE Hawaiian Tel.* Did Not Address the Unique Characteristics of HHL or GTE's Conditional Obligation to Provide Service With Respect to the Extent of Its Study Area

1. Only the HHC can authorize a carrier to install facilities on the HHL.

Although the Commission found the Bureau erred by refusing to consider GTE's late filed objections, the Commission did not address the substance of the extensive conflicting evidence in the record as to the extent of GTE's study area. A study area cannot include those geographic areas in which the company does not have the legal ability to provide telephone services, since such legal authority would be required to establish an area of "operations" consistent with the definition of study area. For wireline service providers, easements and rights-of-ways are critically important in establishing operations. Without the ability to construct local distribution facilities from the central office location to a consumer premises and interconnect its central offices, a telephone company cannot provide service. Locating facilities on HHL requires easements that can only be granted by DHHL, since the right of eminent domain cannot be exercised on HHL. HHL could only be considered part of GTE's study area if DHHL granted GTE the necessary easements throughout the HHL. GTE did not seek and DHHL did not grant unlimited easements. GTE had no authority to operate in any area of the HHL not authorized by DHHL, and therefore, its study area could not have included the entire HHL. Sandwich Isles is the first and only company to have easements throughout the

HHL necessary to provide service, and thus Sandwich Isles study area should be recognized by the Commission as the HHL.

2. Statewide ETC status granted by the HPUC does not create a study area.

In *GTE Hawaiian Tel.* the Commission concluded that the exchanges now served by Sandwich Isles were within the GTE (now Verizon) study area.³⁶ The only stated basis for this conclusion was the December 1997 designation of GTE as an ETC by the HPUC “for the state of Hawaii.”³⁷ ETC designations under the 1996 Telecom Act are not exclusive and are issued to ILECs and CLECs.³⁸ Therefore, such designations cannot, by themselves, delineate a study area. The HPUC order does not purport to determine GTE’s study area, nor is there any precedent or procedure for state commissions to determine study area boundaries. Furthermore, five months prior to the HPUC ETC designation this Commission granted TelHawaii’s Petition and removed the district of Ka’u from GTE’s study area.³⁹

The HHL are in a special class of lands held in trust by the government for a specific purpose. These lands cannot be accessed without the express consent of the trustee. As with US military facilities, the HPUC recognized their regulatory role was

³⁶ *GTE Hawaiian Tel. at para. 9.* Id. at n. 34. This provides no information as to the area encompassed by the study area.

³⁷ *GTE Hawaiian Tel. at para. 9.* The Commission’s statement: “As an incumbent LEC, the designated service area for GTE was its study area.” merely restates the statute, but adds nothing to the question of what geography a study area includes.

³⁸ 47 U.S.C. 214(e)(3).

³⁹ *TelHawaii at 12, 15.*

limited and did not include designating the service provider.⁴⁰ The record shows that the HPUC recognized that the statutory right of telephone companies to acquire access to real estate through eminent domain was not applicable on the HHL.⁴¹ The HPUC also recognized the right of the HHC to “authorize a public utility to provide service on its lands.”⁴² This recognition and the subsequent 1998 HPUC designation of Sandwich Isles as an ETC for HHL⁴³ indicates the HPUC did not intend to use their ETC designation to delineate GTE’s study area.

Furthermore, even though GTE obtained ETC designation from the HPUC, it put no evidence in the record that it sought authority to actually serve “the entire state.” In fact, GTE acceded to a DHHL demand that it remove unauthorized facilities GTE had rushed to install in an area that Sandwich Isles was constructing facilities.⁴⁴ GTE did not contest the DHHL demand to remove its facilities. GTE understood that its ETC designation did not create a statewide study area, which allowed them to provide service on HHL after Sandwich Isles had been granted the exclusive License to serve. This outcome is consistent with the conclusion that GTE’s study area was not the entire state, but only its area of operations.

⁴⁰ “*In the Matter of the Application of Time Warner Communications of Hawaii, L.P. dba Oceanic Communications*”, HPUC Doc No. 94-0264, Order No. 13738, Jan. 20, 1995.

⁴¹ Ltr from Yukio Naito, Chairman HPUC to Albert S.N. Hee, Sept. 20, 1995.

⁴² *Id.*

⁴³ *Application of Sandwich Isles Communications, Inc. For Designation as an Eligible Telecommunications Carrier in the State of Hawaii pursuant to FCC Universal [sic] Report and Order No. 96-45*, Decision and Order, Doc. No. 98-0317, Decision and Order No. 16737, Dec. 9, 1998.

⁴⁴ Watson 1998 letter.

3. A Study Area cannot include unserved areas where the telephone company conditions its obligation to provide service.

GTE's central issue in the 1997 Sandwich Isles waiver proceeding was whether the particular areas where Sandwich Isles was beginning to serve on the island of Oahu were "unserved" within the meaning of previous Common Carrier Bureau rulings.⁴⁵ Sandwich Isles contended it was bringing service to previously unserved HHL areas throughout the State in which GTE lacked license authority to install facilities. Less than 3% of the unserved areas of HHL are located on Oahu with less than 1% located near the city of Honolulu. GTE claimed that because some of these HHL areas were near the city of Honolulu, the fact that they had no service did not mean they were "unserved."

Designation of an unserved area as within a company's study area without a concurrent obligation to serve that area by the company could have the unintended effect of creating areas without the ability to obtain affordable telephone service. For example, Pu'ukapu, a HHL area adjacent to the town of Waimea on the Island of Hawaii did not have phone service despite GTE providing service in Waimea. Residents of Pu'ukapu were without service for fifteen years until Sandwich Isles constructed facilities and offered affordable service.

At the time DHHL issued the telecommunications License to Waimana, GTE conditioned its obligation to furnish service in its tariff filed with the HPUC:

⁴⁵ The significance of whether the areas were "unserved" related to the question of whether USF support could begin immediately based upon projected costs, rather than wait two years for historical costs. The timing precedents did not necessarily consider the "unserved" question on the same basis as the question of whether study area waiver was needed.

“The Telephone Company’s obligation to furnish service is dependent upon its ability to secure and retain, without unreasonable expense, suitable facilities and rights for the construction and maintenance of the necessary pole lines . . .”⁴⁶[emphasis added]

GTE required DHHL to grant the necessary easements and pay whatever costs GTE demanded before GTE would be obligated to serve areas on HHL. GTE’s claims in the Application for Review that it had central offices adjacent to HHL locations were meaningless, since the conditions in GTE’s tariff could not be met.

Through its tariff, GTE geographically limited its service area or area of operations, and therefore its study area, to only those locations that could be legally accessed and economically served through line extension from existing facilities with sufficient capacity to serve. In resolving the concept of study area as applied to GTE’s service area in Hawaii, since GTE effectively had no obligation to serve, the conclusion is that GTE’s study area must be limited to a footprint where service was actually being provided by GTE.

II WAIVER OF THE DEFINITION OF STUDY AREA AND RELATED RULES IS FULLY JUSTIFIED

A. Concept of Study Area

In February 1984, the FCC codified the NARUC Separations Manual into Part 67 of the rules, which included the following definition of study area: “a telephone holding

⁴⁶ HPUC Doc No. 7497; D&O No. 13626, Nov. 2, 1994; p. 11.

company's operations within a single state.”⁴⁷ The manual made no reference to whether the area of a company's “operations” was the same area as the area certificated, an area bigger or smaller, or those areas where the company limits its obligation to serve.⁴⁸

Effective November 15, 1984 the definition was revised to its present form: “Study area boundaries shall be frozen as they are on November 15, 1984.”⁴⁹ This phrase, despite its inclusion in the Appendix-Glossary provides no definition at all. The only meaningful definition available is the previous definition relating to “operations within a state.”

Combining the two, the apparent status of the rules is that changes by carriers subject to Part 36 to their area of operations within a state without FCC approval will not be recognized for interstate access and universal service support purposes. The logical focus of any inquiry then should be to determine the area of a carrier's operations.

In response to a 1995 NECA request for clarification as to when study area waivers are needed, the Common Carrier Bureau stated that the Commission had concurred with a Joint Board statement that implied “waiver of the rule is not required if a separately incorporated company is establishing a new study area for previously unserved territory.” Accordingly the Bureau dismissed as moot the petitions of three companies to create new study areas or begin serving previously unserved territory.⁵⁰

⁴⁷ *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Doc. No. 80-286, Decision and Order, 96 FCC 2d 781, 876 (1984).

⁴⁸ Not all states certificated or necessarily established definitive boundaries. In some states, certificated areas overlapped.

⁴⁹ *Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 50 Fed. Reg. 939 (1985).

⁵⁰ *Request for Clarification Filed by National Exchange Carrier Association*, Memorandum Opinion and Order, 11 FCC Rcd 8156, 8161 (Common Carrier Bureau 1996).

Earlier this year, the Commission, on its own motion, granted a study area waiver to Skyline Telephone Company which was serving an area where no other carrier had facilities or provided service, but which had been within the state certified boundaries of Qwest and Verizon.⁵¹ Stating that a study area corresponds to an incumbent LEC's entire service territory within a state, the Commission concluded that despite the state commission's recognition of a change in service area boundaries and its designation of Skyline as an ETC, a waiver was still required.⁵² The Commission disavowed a previous Common Carrier Bureau decision and concluded that it "has never enunciated an exception to its study area waiver requirements for unserved areas, nor has the term 'unserved' been defined..."⁵³

From the *Skyline* and *GTE Hawaiian Tel.* orders it can, perhaps, be inferred that the Commission will never find that an area within the certificated, designated, or franchised area of an ILEC is "unserved," regardless of whether there are facilities in existence or service provided. Such a conclusion is inconsistent with plain meaning of the word "serve," and leaves open the probability of future disputes that could be avoided by more rigorous analysis. As set forth above, however, there is substantial evidence that GTE's "operations" and hence its study area did not and could not include the HHL.

⁵¹ *M&L Enterprises, Inc. d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612 and 69.2(hh) of the Commission's Rules*, Order, CC Doc. No. 96-45, FCC 04-86, Apr. 12, 2004 ("*Skyline*").

⁵² *Id.* at para. 10.

⁵³ *Id.* at para. 11.